

S. S. MANIAM v. THE STATE OF PERAK

[O. C. J. (Thomson J.) June 28, 1956]

[Ipoh — Civil Suit No. 290 of 1954]

*Contracts (Malay States) Ordinance, 1950, s. 75 —
Breach of contract — Penalty — Claim for return of
deposit.*

Neither section 75 of the Contracts (Malay States) Ordinance, 1950, nor the principles of law laid down in decisions dealing with promises to pay specified sums in case of breach of contract apply to cases of forfeiture of deposits for breach of stipulations even when some of them are but trifling while others are not such.

In such cases the rule is that where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable in amount.

Cases referred to:—

- (1) *Bhai Panna Singh v. Bhai Arjun Singh* A.I.R. 1929 P.C. 179.
- (2) *Wallis v. Smith* (1882) 21 Ch. D. 243, 258.
- (3) *Manian Pattar v. The Madras Railway Co.* (1906) I.L.R. 29 Mad. 118, 119.
- (4) *Singer Manufacturing Co. v. Raja Prosad* (1909) I.L.R. 36 Cal. 960.
- (5) *Younie v. Tulsiram Jankiram* A.I.R. (29) 1942 Cal. 382.
- (6) *Pye v. The British Automobile Commercial Syndicate Ltd.* (1906) 1 K.B. 425, 430.

CIVIL SUIT.

The plaintiff in this case entered into an agreement in writing with the Government of the State of Perak in connection with the running of the Government Rice Mills at Bagan Serai, Parit Buntar and Teluk Anson. The mill at Parit Buntar either did not exist or at the material times was not in operation and no question arose in connection with it. The written agreement was expressed to be made on the March 7, 1954, and to cover the period from 1st March, 1954, to December 31, 1954. The agreement recited that the contractor (plaintiff) had agreed "to do, perform and carry out the work duties and things specified herein" in connection with the running of the Rice Mills and "to supply the labour necessary therefor".

Clause 1 provided that the contractor shall do the things specified in the schedule to the agreement at the rates specified in that schedule. A reference to the schedule shewed that the things to be done could be divided into two classes, in the first place, to supply labourers on daily wages and, in the second place, to do a large number of specified operations at rates specified as so much per bag. These operations included discharging padi, weighing padi, parboiling padi and drying padi.

Clause 2 provided: "(a) That the Contractor shall at all times employ a number of labourers sufficient in the opinion of the Government to ensure the efficient running of the said Rice Mills and in the event of the Contractor failing in the opinion of the Government to employ sufficient labourers to ensure the efficient running of the said Rice Mills the Contractor shall pay to the Government as liquidated damages the sum of dollars fifty (\$50) for each day during which the Contractor shall fail so to employ sufficient labourers.

(b) That any sum or sums payable under paragraph (a) of this clause shall be deducted by the Government from the deposit referred to in Clause 12 hereof.

(c) That when in the opinion of the Government the number of labourers employed by the Contractor has been insufficient for a period of 14 days then a breach of the provisions of the Agreement shall be deemed to have taken place and the provisions of Clause 12(b) shall be applicable."

Clause 12 provided: "(a) That the Contractor as security for the peaceful and good performance of the said work duties and things shall deposit with the Government the sum of dollars five thousand (\$5,000) in cash upon the signing hereof.

(b) That upon the breach non-observance or non-performance by the Contractor of the provisions of this Agreement or any of them or upon failure to do perform or carry out any of the said work duties or things on the part of the Contractor to be performed observed and carried out this Agreement shall absolutely cease and determine and the deposit of dollars five thousand (\$5,000) shall be forfeited to and shall be retained by the Government as liquidated damages."

Clause 7 required that the contractor or his representative should always be present during working hours to receive instructions from the Manager of the Mill, Clause 8 provided that the contractor should give immediate assistance with all the labourers employed by him to put padi under cover in the event of threatening weather to avoid the padi being drenched with rain, and Clause 9 which provides that the contractor and all labourers employed by him shall have the right to occupy the labourers' quarters situated at the Rice Mills free of rent.

In accordance with Clause 12 of the agreement, the plaintiff deposited \$5,000 with the Government on March 2, 1954, and on March 6, 1954, he commenced to do what he considered he was required to do to carry out his obligation. He provided numbers of labourers, which are not in dispute, at both mills. These were under his own general superintendence but as he had other interests, in particular a toddy shop contract, he left the detailed and day-to-day superintendence of the labour in the hands of tindals appointed by him.

From the very beginning the management at both mills were extremely dissatisfied with the way in which the plaintiff carried out his part of the contract and repeated complaints were addressed to him in writing and to him and his tindals verbally. This dissatisfaction mounted until on March 23 the General Manager addressed a letter to the plaintiff telling him that he was "fined \$50 in respect of shortage of labour at Bagan Serai that day." On 24th March a letter was addressed to him saying that he was "fined \$50 in respect of shortage of labour at Bagan Serai that day." On March 25 he was informed both by a letter and by telegram that unless sufficient labour was available within 48 hours his contract would be cancelled under Clause 12(b). On March 27 he was informed that he was "fined \$50 per day in respect of insufficient labourers supplied on 25th and 26th March." Finally, on March 29 a letter was addressed to him informing him that "your contract ceases as from to-day."

Thereafter other arrangements were made for doing the work at the mills at rates considerably higher than those provided for in the plaintiff's contract and he was paid at the contract rates for all work that he had actually done, no deductions being made in respect of the so-called "fines" which had been imposed upon him. The Government, however, retained the \$5,000 which had been deposited in accordance with Clause 12 of the Agreement and treated it as forfeited in terms of that Clause.

The plaintiff thereupon brought an action claiming the return of the deposit, and damages for wrongful termination of the contract.

The learned Judge however found, on the evidence, that it was the plaintiff who was in breach of the contract and therefore the defendant was entitled to treat the contract as at an end and keep the deposit, which was reasonable in amount.

M. S. Mahendran for the plaintiff.

T. R. Hepworth (Sr. Federal Counsel) for the defendant.

Thomson J. (after dealing with the facts of the case which are not relevant for the purposes of this report, continued) :—Having come to the conclusion that it is the plaintiff and not the defendant who was in breach of the contract and that the defendant was entitled to treat the contract as at an end the only question to be decided on the claim is whether or not the plaintiff is entitled to recover the \$5,000 which he deposited under Clause 12 of the Agreement. In that connection, I have listened to a great deal of argument as to whether that \$5,000 is to be regarded as a penalty or as liquidated damages.

In my opinion all that argument is entirely beside the point and has nothing whatever to do with the case. I say so for two reasons.

In the first place, in this country there is no difference between penalty and liquidated damages. Section 75 of the Contract Ordinance which is the same as section 74 of the Indian Contract Act reads as follows :—

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

As is said in *Pollock and Mulla* on the Indian Contract Act (7th Edition, page 410) “This section boldly cuts the most troublesome knot in the Common Law doctrine of damages.” In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty. See *Bhai Panna Singh v. Bhai Arjun Singh*⁽¹⁾.

In the second place, however, this is not a case where the party who is not in breach is suing for the amount named in the contract. It is a case where the party who is in breach is suing for the return of a deposit which he has made by way of security for the proper performance of the contract.

In the case of *Wallis v. Smith*⁽²⁾ Lord Jessel M.R. discussed the English rules as to the question when a sum named in a contract as the amount to be paid in the event of breach is to be regarded as a penalty or liquidated damages. In the course of that discussion he said :—

“There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the Judges have held that this rule does not apply, and that the bargain of the parties is to be carried out.”

In the case of *Manian Pattar v. The Madras Railway Co.*⁽³⁾ the appellant had contracted to supply fuel to the respondent company subject to various stipulations contained in the contract and had deposited a sum of money to be forfeited if he failed to make delivery in accordance with the terms of the contract. He failed to supply in accordance with the terms of the contract and it was held that he was not entitled to recover his deposit. The material passage of the judgment reads as follows :—

“Neither section 74 of the Indian Contract Act nor the expositions of law in decisions English or Indian which were referred to in the argument, as to promises to pay specified sums in case of breach of contract are really in point, for the rule as to penalties dealt with in them has been uniformly held not to be applicable to cases of forfeiture of deposits for the breach of stipulations even where some of them are but trifling while others are not such (*Wallis v. Smith*) the rule governing the class of cases under consideration is that, where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable in amount.”

That case was followed by the Calcutta Court in the cases of *Singer Manufacturing Co. v. Raja Prosad*⁽⁴⁾ and *Younie v. Tulsiram Jankiram*⁽⁵⁾. And for myself, I have no hesitation in following it here.

The only question then that I have to consider in the present case is whether the amount of the deposit forfeited is reasonable. I am satisfied that it is. The contract was a substantial one and substantial sums of money were involved. As a result of the plaintiff's breach two sets of consequences clearly ensued. In the first place, the defendant's mills were left with very large quantities of imperfectly dried padi on their hands which would result in a certain amount of rice produced having a reduced commercial value. In the second place, the defendant was compelled to enter into another contract for the purpose of the work that had to be done immediately and in the circumstances I accept the view that it was inevitable that higher prices had to be paid. In the circumstances, I am compelled to the view that the amount in question was very reasonable indeed.

There only remains the question of whether as a matter of construction there is anything in Clause 2 of the contract which can operate to limit or reduce the amount of the deposit to be forfeited under Clause 12. I do not think it is necessary to embark here on an exhaustive examination of all the circumstances in which these two Clauses might be operative. It is not a case where the defendant is suing for anything under either of the Clauses. It is a case where the plaintiff is suing for his deposit which has been forfeited by the defendant under Clause 12.

It is true that paragraphs (a) and (b) of Clause 2 provide that for any single day on which the contractor did not employ sufficient labour to ensure the efficient running of the mills he should pay to the Government

a sum of \$50 expressed to be by way of liquidated damages to be deducted from his deposit. By reason of section 75 of the Contract Ordinance that is, of course, a penalty clause. But by paragraph (c) when insufficient labourers have been employed for a period of fourteen days then that is to be deemed to be a breach of the provisions of the Agreement such as would invoke the application of Clause 12(b). And it is Clause 12(b) that provides that upon the breach of the Agreement the Agreement shall be determined and the deposit forfeited. It may well be that that is to be construed as a penalty clause but as I have pointed out that is beside the point for in these proceedings the defendant is not trying to enforce the penalty.

The truth is that the plaintiff has brought himself fairly and squarely within Clauses 2(c) and 12(b). The defendant has done what by the terms of the contract he is perfectly entitled to do, that is to say he has kept the deposit and, to my mind, that is the end of the matter. In that connection I would quote the words of Bigham J., in the case of *Pye v. The British Automobile Commercial Syndicate Limited*⁽⁶⁾. In that case the plaintiff was suing for the return of a deposit made in connection with an agency contract for the sale of motor cars. His Lordship discussed the case of *Wallis v. Smith, supra*, with which he was clearly not in entire agreement but went on to observe:—

"The plaintiff here has himself already paid this sum to the defendants. He has parted with the money, and that circumstance is significant to show that he did not intend to have it back if he committed a breach of the agreement."

There will accordingly be judgment for the defendant on the claim and the counter-claim will be dismissed with costs.

With regard to the costs I would point out that for the purposes of taxation the claim should be treated as if it stood alone and the counter-claim should bear only the amount by which the costs of the proceedings have been increased by it. (See *White Book*, 1956, page 1409). In my opinion, the costs of the trial have not been in any way increased by the counter-claim. The questions of law and fact involved would have had to be investigated and tried out just as fully as they were had there been no counter-claim.

Claim dismissed.

I. B. DRENNAN v. R. F. GREER

[C. A. (Thomson C.J., Abdul Hamid and Neal JJ.)
December 4, 1956]

[K. L. — F.M. Civil Appeal No. 40 of 1956]

Negligence — Damages for personal injuries caused by negligence — Duty of care — Volenti non fit injuria — Contributory negligence — Quantum of damages.

In this case the plaintiff was a passenger in a car driven by the defendant from Port Swettenham to

Klang. It appeared that the car was driven at high speed and that the plaintiff warned the defendant to slow down and to be careful as he thought that the defendant was going too fast for the safety of the public on the road. The car collided with a cyclist, the defendant lost control of his car and the accident took place as a result of which the plaintiff sustained the injuries. The plaintiff sued for damages. At the trial liability was denied and it was pleaded (a) that in the circumstances the defendant owed no duty of care to the plaintiff; (b) the maxim *volenti non fit injuria* applied; and (c) that the plaintiff was guilty of contributory negligence. The learned trial Judge held (a) that the defendant owed a duty of care to the plaintiff; (b) that on the facts the defence of *volenti non fit injuria* did not apply; (c) that the plaintiff was not guilty of contributory negligence; and he awarded damages, including an assessment of general damages at \$35,000 to the plaintiff. An appeal was filed against the assessment of general damages.

Held: there was no ground for interfering with the finding of the trial Judge as to the assessment of damages and therefor the appeal must be dismissed.

So far as concern such questions as pain and suffering, any assessment of damages must contain a very subjective element. A very large part in the assessment must be played by the personal opinion of the trial Judge.

Cases referred to:—

- (1) *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685.
- (2) *Daly v. Liverpool Corporation* (1939) 2 All E.R. 142.
- (3) *Insurance Commissioners v. Joyce* (1948) 2 Argus L.R. 356.
- (4) *London Graving Dock Co. Ltd. v. Horton* (1951) 2 All E.R. 1.
- (5) *Dann v. Hamilton* (1939) 1 K.B. 509.
- (6) *Slater v. Clay Cross Co. Ltd.* (1956) 2 Q.B. 264.
- (7) *Nance v. British Columbia Electric Railway* (1951) A.C. 601.
- (8) *Caswell v. Powell Duffryn Collieries* (1940) A.C. 152.
- (9) *Shearman v. Folland* (1950) 2 K.B. 43.
- (10) *British Transport Commission v. Gourley* (1956) 2 W.L.R. 41; (1956) A.C. 185.
- (11) *Billingham v. Hughes* (1949) 1 K.B. 643.
- (12) *Bird v. Cocking & Sons Ltd.* (1951) 2 T.L.R.
- (13) *Flint v. Lovell* (1935) 1 K.B. 354.
- (14) *Davies v. Powell Duffryn Associated Collieries Ltd.* (1942) A.C. 601, 616.
- (15) *Rushton v. National Coal Board* (1953) 1 All E.R. 314.

In the Court below the following judgment was delivered:—

Buhagiar J.:— This is a claim for damages in respect of personal injuries sustained by the plaintiff in a car accident. The facts are as follows:—

On the 4th September, 1955, the plaintiff who was then a representative of the Manufacturers' Life Assurance Company, went to see the defendant at North Mummock Estate, Klang, about insurance matters; he went there in his own car; they arrived at